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No. 85-1544

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in an action under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60, Section 5 of that Act and the collateral source rule permit a railroad to set off in mitigation of its liability to an injured employee the amount in medical expenses which were paid on the employee's behalf under a group medical and hospital insurance policy which is a fringe benefit of employment to the employee?

2. Whether it is reversible error for a trial judge in an FELA action to not instruct the jury that the plaintiff's damage award is not subject to income taxation when the jury does not act under a false impression of the tax laws and award an amount clearly in excess of plaintiff's proven damages?

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No. 85-1544

In The
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October Term, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondent, Jack D. Anderson, disagrees with and supplements the petitioner's statement of the case regarding the following points. The medical bills Mr. Anderson incurred in treatment of the injuries he sustained in his accident of February 28, 1978, were not paid either directly by or through an indemnity plan. They were paid pursuant to a policy of general health and accident insurance known as Travelers Insurance Group Policy No. GA-23000. At no time during the lower court proceedings did the B.N. either prove the portion of the

premium it contributed to Travelers Insurance for coverage afforded the plaintiff under Policy GA-23000, or request as a set off against its FELA liability the amount of the *premiums* it paid on his behalf.

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REASONS FOR DENYING THE WRIT

I. THE OPINION BELOW CORRECTLY HELD THAT THE RAILROAD CANNOT SET OFF FROM ITS LIABILITY UNDER THE FELA THE AMOUNT IN MEDICAL EXPENSES PAID PURSUANT TO POLICY GA-23000.

The decision below, precluding the railroad from setting off from its liability under the FELA the amounts in medical expenses paid under Travelers Group Health and Accident Policy No. GA-23000, was in accordance with the substantial body of law that has considered this issue in view of the collateral source rule and Section 5 of the FELA. The result does not conflict with the applicable decisions of this Court, the federal appellate courts, or another state court of last resort. When the factual situations involved in the cases relied upon by petitioner are examined, it is evident these authorities are not controlling. Contrary to the assertions of petitioner, no questions of law are present in this case which justify the grant of a writ of certiorari.

A. Background Of The Distinction Between Coverage For Operating Versus Non-Operating Railroad Employees Under Policy GA-23000

To fully understand the basis for what seemingly appear to be different results reached by courts on this question, it is necessary to review the distinction between the manner in which non-operating as opposed to operating railroad employees obtained coverage under this policy. This forms, in part, the basis for differentiating a limited employer indemnity plan from a general policy of health and accident insurance which is a fringe benefit to the employee and within the ambit of the collateral source rule. The respondent in this case is a locomotive engineer, an operating employee engaged in the actual operation of the trains.

Prior to 1955, the union agreements with the railroads for both categories of employees did not require the payment of medical expenses for on-duty injuries. In 1955, an agreement was entered into between the railroads and the union representing *non*-operating employees wherein the union elected to receive lesser wages than those paid to operating employees in exchange for coverage under Policy No. GA-23000. The operating employees chose to receive the cost of the coverage in money wages.[1] Thereafter, the Collective Bargaining Agreement of August 19, 1960, at Article V, Section 1(d)(1), recited the agreement with the *non*-operating employees—that the premiums for medical payments covering on-duty injur-

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[1] *See Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. 981, 983 (W.D.N.Y. 1977).

ies were to be paid solely by the railroad and *not* considered as wage equivalents to the employee.[2]

The operating employees were not covered by the policy until an agreement was reached on March 26, 1964. Their agreement omitted the provision that the premiums for the on-duty injury coverage were not wage equivalents. In 1968, both groups of employees became insured through the same Group Policy No. GA-23000 and although it was later amended, the premium structure remained the same.[3] As discussed following, the coverage for operating employees is a bargained for fringe benefit of employment in lieu of wages.

B. As Applied To Operating Employees, The Collateral Source Doctrine Precludes The Set-Off Of Either Premiums Contributed To, Or Benefits Paid Under, Policy GA-23000

Petitioner has confused the distinction between a limited employer indemnity plan and a policy of general hospital and medical insurance coverage which is a fringe benefit to the employee. The former exists when an employer voluntarily undertakes to indemnify itself against potential legal liability; the indemnity plan covers only those injuries sustained on the job for which the employer may be liable at law, is solely for the benefit of the em-

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2 *See Urbaniak*, 424 F. Supp. at 983; *Thomas v. Penn Central Co.*, 379 F. Supp. 24, 27 (W.D. Pa. 1974).

3 *See Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. at 984.

ployer, and is not a fringe benefit to the employees in part consideration for their labors.[4]

A true indemnity plan is vastly different from the nature and operation of Policy GA-23000. This policy contract, in actuality, exists between the insurer and the employee policy holders. As an economic term of the collective bargaining agreement, the railroad is required to pay premiums to the insurer much as an employer might at the direction of an employee deduct funds from wages and forward them directly to the employee's creditor or own group health insurer.[5] The policy is a fringe benefit provided in part consideration for the employee's services to the railroad and cannot be characterized as a gratuity. Eligibility for benefits is not contingent upon sustaining injuries for which the railroad may be liable at law, and was not voluntarily established by the railroads in an attempt to indemnify against liability under the FELA.[6]

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[4] *See Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 450 (8th Cir. 1984); *Patterson v. Norfolk & Western Railway*, 489 F.2d 303, 308 (6th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d 788, 791 (5th Cir. 1972); *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1021 (9th Cir. 1973); *Hall v. Minnesota Transfer Ry.*, 322 F. Supp. 92, 96 (D. Minn. 1971).

[5] *See Patterson v. Norfolk & Western Railway*, 489 F.2d 303, 308 (6th Cir. 1973); *Hall v. Minnesota Transfer Railway*, 322 F. Supp. 92, 96 (D.Minn. 1971).

[6] *See Patterson v. Norfolk & Western Railway*, 489 F.2d at 308; *Hall v. Minnesota Transfer Railway*, 322 F. Supp. at 96; *See also* discussions in *Blake v. Delaware & Hudson Railway*, 484 F.2d 204, 206-07 (2d Cir. 1973); *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. Ct. App.

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The courts have been careful to point out that a fund does not lose its status as a collateral source simply because the employer/tort-feasor contributes premiums to the fund from which benefits are paid.[7] As the Eighth Circuit recently stated in an FELA action, "[m]edical expenses paid for by insurance are exempt from set-off regardless of whether the employer paid one hundred percent of the insurance premiums." *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 450 (8th Cir. 1984). The vast majority of federal circuit and district courts adhere to the rule that it is the character of the benefits received, not the source of the funds, which governs whether the collateral source rule applies.[8] Therefore, the Second, Sixth and Eighth Circuits and most other courts have held that the benefits of Policy GA-23000 arise from a collateral source and that the railroads are prohibited from setting off from their liability under the FELA

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1977) (Petitioner's App. at 37a); *Southern Pacific Transportation Co. v. Allen*, 525 S.W.2d 300, 307 (Tex. Civ. App. 1975); and *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020-21 (9th Cir. 1973) (pension benefits a fringe benefit and not subject to set off under the Jones Act); *Haughton v. Blackships, Inc.*, 426 F.2d 788, 791 (5th Cir. 1972) (disallowing deduction of maritime pension in mitigation of damages owed under the Jones Act).

[7] *See Blake v. Delaware and Hudson Railway*, 484 F.2d at 206 (2d Cir. 1973); *Patterson v. Norfolk & Western Railway*, 489 F.2d at 308 (6th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d at 790 (5th Cir. 1972); *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 534-35 (9th Cir. 1962); *United States v. Price*, 288 F.2d 448, 450 (4th Cir. 1961); *Hall v. Minnesota Transfer Railway*, 322 F. Supp. at 95 (D. Minn. 1971).

[8] *See* note 7 *supra*.

either the insurance premiums paid to Travelers, or the amounts payable in medical expenses under the policy.[9] The opinion of the Montana Supreme Court in this case is in accord with these decisions.

The policy considerations underlying the collateral source rule have been well established by this Court and the federal courts for many years. The doctrine embraces the principle that a wrongdoer should not benefit by mitigating his responsibility as a tort feasor through a set off of funds available to the injured person from a collateral source.[10] In *Eichel v. New York Central Railway Co.*, 375 U.S. 253, 255-56 (1963), this Court recognized that evidence of an injured employee's collateral benefit entitlement is readily subject to misuse by the jury and would involve the substantial likelihood of prejudicial

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9 *Clark v. Burlington Northern, Inc.* 726 F.2d at 451 (8th Cir. 1984); *Wilcox v. Clinchfield Railroad*, 747 F.2d 1059, 1061 (6th Cir. 1984); *Patterson v. Norfolk & Western Railway*, 489 F.2d at 308 (6th Cir. 1973); *Blake v. Delaware & Hudson Railway*, 484 F.2d at 207 (2nd Cir. 1973); *Urbaniak v. Erie Lackawanna Railway*, 424 F.Supp. at 984 (W.D.N.Y. 1977); *Hall v. Minnesota Transfer Railway*, 322 F.Supp. at 97 (D. Minn. 1971); *Herbst v. Burlington Northern Railroad*, CV-84-51 BLG (D.Mont. April 22, 1985) (Petitioner's App. at 32A); *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. App. 1977) (Petitioner's App. at 34A); *Southern Pacific Transportation Co. v. Allen*, 525 S.W. 2d 300, 307 (Tex. Civ. App. 1975).

10 *See Russo v. Matson Navigation Co.*, 486 F.2d at 1020 (9th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d at 791 (5th Cir 1972); *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958).

impact.[11] The Fifth Circuit interpreted *Tipton* and *Eichel* to, ". . . reflect a strong policy against the use of such collateral source evidence in FELA and analogous Jones Act—maritime law seamen's cases."[12] Moreover, the collateral source rule requires the tort feasor to pay but once:

> The question is not whether a windfall is to be conferred, but rather who shall receive the benefit of a windfall which already exists. As between the injured person and the tort feasor, the former's claim is better. This may permit a double recovery, but it does not impose a double burden. *The tort feasor bears only the single burden for his wrong.*
>
> That burden is imposed by society, not only to make the plaintiff whole, but also to deter negligence and encourage due care. (emphasis added).[13]

C. Even If The On-Duty Injury Clause Of Policy GA-23000 Represents An Employer Indemnity Plan, Section 5 Of The FELA Allows The Railroads To Set Off Only The Premiums Paid

As discussed, the issue petitioner fails to recognize is that Policy No. GA-23000 is not an employer indemnity plan. However, even assuming the on-duty injury clause

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11 In *Eichel* it was held the railroad could not set off either amounts it contributed to the Railroad Retirement Fund under 26 U.S.C. § 3221 et seq., nor benefits received. *See also Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 35 (1963) (Jones Act.)

12 *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 822 (5th Cir. 1965).

13 *Russo v. Matson Navigation Company*, 486 F.2d at 1021 (9th Cir. 1973); *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d at 534 (9th Cir. 1962); *See also Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. Ct. App. 1977) (Petitioner's App. at 40a).

of the policy creates an indemnity plan,[14] Section 5 of the FELA [45 U.S.C. § 55][15] in explicit terms prohibits a set off in excess of the contributions made by the railroad to the plan.

The forerunner to Section 5 was Section 3 of the first FELA passed by Congress in 1906, which provided in relevant part that, "no *contract* of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee. . . ."[16] Thereafter, Congress reviewed the entire Act, with particular attention directed to Section 3 and various state employers' liability acts and their experience with them.

Under the state acts, it was found that employers had engaged in various attempts to contract themselves out of liabilities the acts intended to impose. The states reacted with varying provisions, all of which were directed towards voiding such arrangements.[17] Former Section 3

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[14] *See Southern Pacific Transportation Co. v. Allen,* 525 S.W.2d at 307, which specifically found the on-duty clause of Policy GA-23000 was not an indemnity plan since it affords coverage, "irrespective of the ultimate liability of the employer."

[15] *See* Petitioner's App. at 17a.

[16] 34 Stat. 232 (1906). This Act was declared unconstitutional in *Employer's Liability Cases,* 207 U.S. 463 (1907).

[17] *See Duncan v. Thompson,* 315 U.S. 1, 6 (1942); H. R. Rep. No. 1386, 60th Cong., 1st Sess. 30-75 (1908).

was incorporated verbatim in one of two bills introduced in the Senate, but the bill which survived consideration contained the broader language of the current Section 5 which replaced "contract" with "any contract, rule, regulation, or device whatsoever."[18]

In 1942, this Court found that the rejection of the word "contract" in favor of the language now contained in Section 5, "argues persuasively that Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies."[19] The broad scope of Section 5 was outlined long ago in *Philadelphia, Baltimore & Washington R. Co. v. Schubert,* 224 U.S. 603, 611 (1912) wherein this Court said:

> The evident purpose of Congress was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from *any* liability created by this act.' It includes every variety of agreement or arrangement of this nature * * *[20] (emphasis added).

Congress intended to prohibit attempts to avoid any liabilities created for railroads under the FELA. The foregoing cases establish that Section 5 cannot be con-

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18 *See* Hearings on S. 3080, February 20 3 (1908); and cf. S. Rep. No. 460, 60th Cong., 1st Sess. 4 (1908).

19 *Duncan v. Thompson,* 315 U.S. 1, 6 (1942); *Boyd v. Grand Trunk Western Railroad Co.,* 338 U.S. 263, 265 (1949).

20 Also cited with approval in *Duncan v. Thompson,* 315 U.S. at 40 (1942).

fined to the narrow interpretation suggested by petitioner.

When a fund is not a collateral source, Section 5 does permit a railroad to offset from its liability under the FELA " . . . any sum *it has contributed or paid* to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . ." In concise terms, Congress authorized the railroads to receive the benefit of only the amount of their actual contributions to the indemnity or insurance plan.[21] In 1973, the Ninth Circuit recognized that, "[c]learly, the statute [Section 5] does not provide for a set off of benefits received, but rather for a set off of any sum . . . contributed."[22]

Article III, Section A of the Health and Welfare Agreement relied upon by the B.N. purports to permit the railroads to set off the amount of benefits provided under Policy GA-23000—not just the insurance premiums paid to the plan.[23] This is precisely what is proscribed by Section 5. As Circuit Judge Friendly correctly concluded in a concurring opinion: "Under 45 U.S.C. § 55 the railroad is entitled to set off only the premiums, not what the premiums bought. This was recognized as long ago as *Bangor & Aroostook R. Co. v. Jones*, 36 F.2d 886 (1 Cir.

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21 *See Philadelphia, Baltimore & Washington R. Co. v. Schubert*, 224 U.S. at 612; 40 Cong. Rec. 7662 (1906) (remarks of Mr. Gallinger).

22 *Russo v. Matson Navigation Company*, 486 F.2d 1018, 1020 (9th Cir. 1973) (Jones Act, which incorporates Section 5 in 46 U.S.C. § 688).

23 *See* Petitioner's App. at 27a.

1929).''[24] The Montana Supreme Court correctly decided, as have other courts, that the offset provision in the collective bargaining contract exceeds the parameters imposed by federal statute and is void.[25]

The first sentence of Section 5 expressly voids *any* device which enables a railroad to exempt itself from *any* liability under the FELA. By use of an indemnity plan, part or all of an injured employee's claim under the FELA is paid by the plan rather than by the railroad. As a result, the railroad itself is relieved from liability for that portion of the employee's FELA claim. Congress, in drafting the proviso to Section 5, obviously anticipated that the railroads would seek to indemnify themselves against liabilities created under the FELA. Congress faced the issue of what amount of credit should be given the railroads for payments made from an indemnity or insurance plan ''on account of injury'' for which the railroad may be liable under the FELA. The proviso to Section 5 creates a limited exception to voiding such arrangements, but authorizes a maximum set off of only the sums

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[24] *Blake v. Delaware and Hudson Railway*, 484 F.2d at 207 (2d Cir. 1973); *Bangor & Aroostook R. Co. v. Jones*, 36 F.2d at 891; *See* also *Chicago & Alton Railroad Co. v. Wagner*, 239 U.S. 452, 458 (1915); *Lucht v. Chesapeake & Ohio Railway*, 489 F.Supp. 189, 190 (W.D. Mich. 1980).

[25] *See Blake v. Delaware & Hudson Railway*, 484 F.2d at 207; *Herbst v. Burlington Northern Railroad Co.*, CV-84-51 BLG (D.Mont. April 22, 1985) (Petitioner's App. at 33a); *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. Ct. App. 1977) (Petitioner's App. at 34a, 40a.) (voiding the same arrangement in a collective bargaining agreement which allowed the railroad a set off for benefits paid from a group disability insurance policy).

the railroad contributes to the indemnity plan. A device of any nature which permits a greater set off to the railroad than that specifically allowed is void as a matter of statutory federal law.[26]

Lastly, petitioner argues that the set off provision in the bargaining agreement came about as a result of the *obiter dictum* set forth in the concurring opinion of Judge Friendly in *Blake v. Delaware & Hudson Railway,* wherein he suggested the railroads include a, " . . . specific provision in the collective bargaining agreement."[27] Judge Friendly did not outline the terms of any such provision, but having acknowledged that a controlling federal statute entitled the railroads to set off only their premium contributions, it is extremely doubtful that he was suggesting a set off arrangement exceeding the parameters of that law.[28] It would seem more probable that such an agreement would be similar to the bargaining arrangement with the non-operating employees which specified the premiums payable for the on-duty injury clause were not wage-equivalents to the employee. This would tend to establish the on-duty injury coverage as an employer indemnity plan rather than as a collateral source benefit to the employee, thereby allowing the railroad to set off the premiums paid in accordance with the proviso to Section 5. Another provision more in keeping with Section 5 would be an agreement that the on-duty coverage be deemed an indemnity plan for the benefit of the employer.

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26 See note 25 *supra*.

27 484 F.2d at 207 (2d Cir. 1973).

28 *Id.*

D. Petitioner's Authorities Distinguished

Petitioner relies upon those authorities cited at notes numbered 16 and 17 of its petition. When the facts of these cases are analyzed, it becomes readily apparent they are distinguishable and not controlling.

Nearly all of these cases involved *non*-operating railroad employees, which caused the courts to conclude that Policy GA-23000 was not a fringe benefit to the employee and outside the scope of the collateral source rule based on the provision in the bargaining agreement not found in ~~this~~ case which provided the amounts paid as premiums were not considered wage equivalents.[29] It should be noted that none of the foregoing cases are from a circuit court or the highest court of any state. These courts also followed a minority position, supported only by a handful of older state court cases, that a fund cannot be considered a collateral source simply because the plaintiff did not directly pay the premiums.[30] Moreover, the cases did not

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[29] *See Nelson v. Penn Central Railroad,* 415 F.Supp. 225, 227 (N.D. Ohio 1976); *Thomas v. Penn Central Company,* 379 F.Supp. 24, 26-27 (W.D. Pa. 1974); *Diaz v. Indiana Harbor Belt Railroad,* Civ. No. H79-13 (N.D. Ind. Dec. 1, 1981) (Petitioner's App. at 42a, n. 3); *Rogers v. Chicago & North Western Transportation Co.,* 375 N.E.2d 952, 958 (Ill. App. 1978).

[30] *See Thomas v. Penn Central Company,* 379 F.Supp. at 25-26; *Rogers v. Chicago & North Western Transportation Co.* 375 N.E.2d at 958.

consider either the set off provision in the bargaining agreement or the application of Section 5.[31] In the unreported federal district court case cited by petitioner, the plaintiff apparently did not argue to the court that the set off provision in the bargaining agreement exceeded the scope of the proviso to Section 5.[32]

Petitioner offers *Thomas v. Humble Oil & Refining Co.*[33] as evidence of "diversity of interpretation" among the courts. *Humble Oil* involved a shipowner's disability benefit plan as a supplement to maritime maintenance under the Jones Act.[34] The case did not involve the GA-23000 policy, and predated all of those cases which have. Similar to the railroad's bargaining agreement with the *non*-operating employees, the agreement in *Humble Oil* stated that no contribution to the plan was made by the employees.[35] It also appears from the opinion that no insurance premiums were paid but that all benefits emanating from the fund were contributed by the shipowner, in which case Section 5 would allow a set off of benefits paid. *Humble Oil* has since been limited by later authorities as not involving a fringe benefit plan for employees, but a voluntary employer indemnity plan created solely

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31 *See Nelson v. Penn Central Railroad*, 415 F.Supp. 225 (N.D. Ohio 1976); *Rogers v. Chicago & Northwestern Transportation Co.*, 375 N.E.2d 952 (Ill. App. 1978).

32 *Diaz v. Indiana Harbor Belt Railroad*, Civ. No. H79-13 (N.D. Ind. Dec. 1, 1981) (Petitioner's App. at 45a).

33 420 F.2d 793 (4th Cir. 1970).

34 *Id.* at 794.

35 *Id.*

for the benefit of the employer and written to cover only those injuries for which the employer might be liable by law.[36]

Wagner v. Reading Co.[37] was also an early case which only briefly addressed the set off issue in a foot-note without reviewing either relevant case law or Section 5.[38] The opinion did not mention whether Policy GA-23000 or similar coverage was involved, or if the coverage was instead limited to indemnifying the railroad for liabilities under the FELA.[39] Allowance of the set off was premised on the finding that whatever insurance was involved was not a collateral source.[40] *Wagner* has since been limited to the situation where the railroad is the insured under the policy —not the injured employee as is the cause with Policy GA-23000.[41]

What petitioner has done is collect a variety of cases involving distinguishable factual circumstances to incorrectly suggest that inconsistent results have been achieved in the lower courts. It is not only unnecessary but legally impossible to arrive at a single decision which will antici-

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36 *See Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1021 at n.1 (9th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d 788, 791 (5th Cir. 1972); *Hall v. Minnesota Transfer Railway*, 322 F.Supp. 92, 96-97 (D.Minn. 1971).

37 428 F.2d 289 (3d Cir. 1970).

38 *Id.* at 292, n. 7.

39 *See Hall v. Minnesota Transfer Railway Co.*, 322 F.Supp. at 97.

40 *Wagner*, 428 F.2d at 292, n. 7.

41 *See Patterson v. Norfolk & Western Railway*, 489 F.2d 303, 308 (6th Cir. 1973).

pate and resolve all divergent factual situations. This is particularly true with the collateral source rule:

> It is incorrect to analyze the ambit or boundaries of the collateral source rule in the context of a search for a single applicable rule. The application or non-application of the rule encompasses many different situations and each one must be analyzed separately.[42]

II. THE OPINION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN LIEPELT

Following the rationale of cases decided after *Liepelt*, the court below held that any error associated with the trial court's failure to instruct regarding the effect of income taxes was harmless in this case.[43] However, there is no precedential value in connection with this holding since the court required that the instruction be given in the future.[44]

A. This Court Has Denied Certiorari Review Of Several Cases Applying The Harmless Error Rule Since Liepelt

Contrary to the argument of petitioner, application of the harmless error rule does not contravene the holding

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[42] *See Feeley v. United States*, 337 F.2d 924, 927-28 (3d Cir. 1964).

[43] *Anderson v. Burlington Northern, Inc.*, — Mont. —, 709 P.2d 641, 646 (1985); Petitioner's App. at 9a. Ordinarily, this Court denies certiorari to review evidence or the inferences drawn therefrom. *See N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951).

[44] *Anderson*, 709 P.2d at 646-47, Petitioner's App. at 9a.

in *Liepelt.* The rule has a long history of approval by this Court.[45] An error will not be reversed unless it affects the substantial rights of the complaining party.[46] Jury instructions are subject to the rule, and it is the appellant's burden to establish the prejudicial effect of the trial court's refusal to give a requested instruction.[47] The extent of the error is evaluated in light of the verdict.[48] The harmless error rule is also based on federal law.[49]

In the present case, the jury awarded Mr. Anderson $195,000 for *all* damages sought, including those for pain and suffering for the permanent injuries to his neck which required an anterior fusion. That award was $45,000 less than the $240,000 in loss of just past and future earnings established by Anderson's economist.[50]

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45 *Pugh v. McCormick,* 81 U.S. (14 Wall.) 361 (1871).

46 *United States v. Borden Co.,* 347 U.S. 514 (1954); *McLanahan v. Universal Insurance Co.,* 26 U.S. (1 Pet.) 170 (1828).

47 *Meyers v. Union Pacific Railroad Co.,* 738 F.2d 328, 330 (8th Cir. 1984).

48 *Brewer v. Jeep Corp.,* 724 F.2d 653, 656 (8th Cir. 1983).

49 28 U.S.C. § 2111 (1982).

50 *Anderson v. Burlington Northern, Inc.,* — Mont. —, 709 P.2d 641, 646 (1985); Petitioner's App. at 9a. Respondent objected to the admission of any testimony from B.N.'s annuity broker on the issue of lost earnings, since he lacked qualifications in the field of economics and was not competent to testify regarding growth and discount rates. App. at 1. *See Jones & Laughlin Steel Corp v. Pfeifer,* 462 U.S. 523 (1983). Recently, the Ninth Circuit held that the same annuity broker's testimony was properly excluded. Since he was not qualified to testify as to the appropriate inflation rate and plaintiff's economic loss, his opinion on the cost of various annuities would be irrelevant. Further, the

(Continued on following page)

In *Flanigan v. Burlington Northern, Inc.*,[51] an Eighth Circuit case relied on by the court below,[52] the court likewise found the jury did not award an amount clearly in excess of plaintiff's proven damage figure. Chief Judge Donald P. Lay, writing for the court pointed out that:

> . . . the prejudicial effect of a failure to give a nontaxability instruction should be decided on the existence of evidence that the jury did, in fact, operate under a false impression of the tax laws.[53]

Judge Lay distinguished the factual situation presented in *Liepelt:*

> . . . The *Liepelt* jury awarded the plaintiff $775,000 whereas the plaintiff's own economist testified to lost earnings of only $302,000. This large disparity between the evidence and the verdict greatly influenced the Supreme Court in deciding that the failure of the trial court to give a nontaxability instruction was prejudicial error.[54]

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jury could be misled by concluding that the plaintiff had to purchase an annuity. *Taylor v. Burlington Northern, Inc.*, No. 84-3764 (9th Cir. April 18, 1986) (available on West law). Moreover, the jury award of $195,000 for *all* damages cannot be deemed inflated or excessive when the annuity broker's *lowest* estimate for just loss of earnings was $115,000.

51 632 F.2d 880 (8th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981).

52 The court followed its holding in *Dallas v. Burlington Northern, Inc.*, — Mont. —, 689 P.2d 273 (1984) which relied on *Flanigan. See Dallas,* 689 P.2d at 278. The petitioner did not seek certiorari review of the Montana Supreme Court's decision in *Dallas.*

53 *Flanigan v. Burlington Northern, Inc.*, 632 F.2d at 890.

54 *Id.*

The *Liepelt* court found from this enormous disparity that it was likely the jury inflated its verdict on a mistaken belief that a large part of the recovery would go toward payment of taxes.[55] The Second Circuit,[56] based on a Michigan Law School study,[57] concluded that juries generally do not increase recoveries on the erroneous belief they will be taxed.

Moreover, *Liepelt* involved a wrongful death claim and plaintiff's proof centered on the loss of decedent's pecuniary earnings and the net amount which could be contributed to his dependents.[58] *Flanigan* and the instant case involve injury claims, also entitling plaintiffs to compensatory damages for pain and suffering and medical expenses.[59]

Certiorari review was denied in *Flanigan*, as well as in three other appellate court decisions applying the harmless error rule since *Liepelt*.[60] The court below found the

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55 *Norfolk & Western Railway v. Liepelt*, 444 U.S. at 497.

56 *See McWeeney v. New York, New Haven and Hartford Railroad*, 282 F.2d 34, 39 and n. 15 (2d Cir. 1960); *Rouse v. Chicago, R.I. and P.R.R.*, 474 F.2d 1180, 1183-84 n. 3 (8th Cir. 1973).

57 Kalven, A report on the Jury Project, Conference on the Aims and Methods of Legal Research, University of Michigan Law School, 167-68 (1957).

58 *Norfolk & Western Railway v. Liepelt*, 444 U.S. at 497.

59 *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d at 890.

60 *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 890 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Vanskike v. ACF Industries*, 665 F.2d 188, 206-07 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Faulkenberry v. Kansas City Southern Railway*, 661 P.2d 510, 512-13 (Okla. 1983), *cert.*

(Continued on following page)

same rationale applicable to the facts of this case and no review of the decision is required.

B. Certiorari Review Is Unnecessary Since The Decision Below Requires The Trial Courts To Give The Liepelt Instruction In The Future

In its opinion, the Montana Supreme Court overruled 26 years of prior case law[61] in stating:

> . . . [W]e are compelled to comment that in the future it would be better for a trial court to give a nontaxability instruction to the jury.
>
> * * *
>
> We make this comment because of trial courts' reliance on previous holdings by this court that future income tax liability is an improper consideration in formulating an award for loss of future earnings.[62]

There is no precedent established by this case in conflict with *Liepelt* which requires certiorari review.

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denied, 464 U.S. 850 (1983); *Marlow v. Atchison, Topeka & Santa Fe Railway*, 671 P.2d 438, 442-43 (Colo. Ct.App. 1983); *Caribe Tugboat v. Duffy*, 427 So.2d 227 (Fla. Dist. Ct.App. 1983) (per curiam), *cert. denied*, 464 U.S. 1041 (1984); *Marynik v. Burlington Northern, Inc.*, 317 N.W.2d 347, 351 (Minn. 1982).

61 *See Torchia v. Burlington Northern, Inc.*, 174 Mont. 83, 568 P.2d 558 (1977); *Bracy v. Great Northern Railway Co.*, 136 Mont. 65, 343 P.2d 848 (1959).

62 *Anderson v. Burlington Northern, Inc.*, 709 P.2d at 646-47; Petitioner's App. at 9a-10a.

C. The Issue As To The Admissibility Of Evidence Regarding After Tax Earnings Was Not Passed Upon In The Decision Below

The Montana Supreme Court did not address the trial court's decision not to admit evidence showing the amount in income taxes plaintiff paid over the years 1974 through 1982. It is the settled practice of this Court to refrain from deciding issues not passed upon in the highest court of the state whose decision this court is called upon to review.[63]

Further, the *Liepelt* decision clearly stated it was not creating a rigid rule that all evidence of after tax earnings, in every form, is *per se* admissible. The Court elaborated in a footnote:

> This is not to say, however, that introduction of such evidence must be permitted in every case. If the impact of future income tax in calculating the award would be *de minimis*, introduction of the evidence may cause more confusion that it is worth. Cf. Fed. Rule Evid. 403.[64]

As a Colorado Appellate Court noted, " . . . the *Liepelt* case does not establish a rule that any evidence, in whatever form, which is offered as a basis for calculating the effect of taxes on lost future earnings is *per se* admissible."[65]

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[63] *Illinois v. Gates*, 462 U.S. 213, 219 (1983); *State Farm Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160 (1945); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-36 (1940).

[64] *Liepelt*, 444 U.S. at 494 n. 7.

[65] *Marlow v. Atchison, Topeka & Santa Fe Railway*, 671 P.2d 438, 442 (Colo. Ct.App. 1983).

In this case, B.N. offered to show through cross-examination of plaintiff's economist that plaintiff was taxed at an average annual rate of 17 percent based on variable earnings he had over the years 1974 through 1982.[66] That time period included several years prior to his injury. Petitioner did not produce an expert economist of its own, and there was no competent evidence to establish what the rate of taxation would be on lost future earnings. In *Marlow v. Atchison, Topeka & Santa Fe Railway,* the same evidence was rejected where there was no proof to establish the rate of taxation on projected earnings plaintiff would lose as a result of his injury.[67] Moreover, any error in refusing its admission was harmless.

The trial courts must be afforded latitude to determine the admissibility of specific types of evidence. The guidelines established by *Liepelt* must be applied by the trial courts.[68] Trial courts are traditionally allowed broad discretion in their determinations regarding the admissibility of evidence.[69]

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66 Petitioner's App., 21a-4a.

67 671 P.2d 438, 442 (Colo. Ct.App. 1983).

68 *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880, 884 (8th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981).

69 *Id.* (citing *Lavender v. Kurn,* 327 U.S. 645 (1946).

CONCLUSION

For the foregoing reasons, a writ of certiorari should not be issued to review the judgment and opinion of the Supreme Court of the State of Montana.

Respectfully submitted,

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May 14, 1986

APPENDIX

EXCERPTS FROM THE TRIAL TRANSCRIPT

* * * *

(p. 506) Mr. Koolen: Mr. Faulhaber, if you would come forward and be sworn, we will let you take the witness stand up on the left.

THOMAS JOSEPH FAULHABER, being first duly sworn, testified as follows:

Direct Examination by Mr. Koolen:

Q. Would you tell us your name, please, sir?

A. Thomas Joseph Faulhaber.

Q. And where do you live?

A. Edina, Minnesota.

(p. 507) Q. What is your occupation, Mr. Faulhaber?

A. I am an annuity broker.

Q. And what is your educational background and training?

A. I graduated from college with a Liberal Arts Degree. My major was philosophy. I continued on with four more years of college, and my degree there was theology. I was ordained to the ministry in 1865, and I was in the ministry for seven years until 1972. In 1974 I entered the life insurance industry with a company called Con-

necticut Mutual Life, and I have been in the insurance industry specializing in annuities for the past ten years.

Q. Now, you say that you are an annuities broker specializing in annuities. Could you tell us exactly what you do in that capacity?

A. All right. By the term broker, it simply means that I am not locked into any one particular life insurance company that issues annuities. I have access by having contracts with many of the major life insurance companies in our country that issue annuities. So as a broker, I can price annuities out from various companies, and then select the most competitive company at that particular time.

Q. And if your business, then, is annuities, could you explain for us exactly what annuities are?

(p. 508) A. First of all, an annuity is a product that is sold by a life insurance company. Once the contract or policy has been issued from an individual, from that point on, the obligation and the responsibility of the life insurance company is to make a series of payments back to the purchaser, which we call the annuitant--that's the one receiving those payments.

Q. Mr. Faulhaber, then have you taken courses in economics?

A. No, I haven't.

Q. Have you obtained any degrees in any of your educational dealings with the field of economics in any way?

A. I have not.

Q. Do you have, then, any opinions about economic theory or its application?

A. No. I would have no opinions on economic theories or their possible applications.

Q. Are you able to work with economic growth rates and discount rates and explain them?

A. No, that's not my field.

Q. Then in your field of annuities, did you, at my request, prepare several alternate annuity programs for Jack Anderson?

A. Yes, I did.

(p. 509) Mr. Koolen: Your Honor, may we approach the bench?

(WHEREUPON, the following proceedings were held outside the hearing of the jury.)

Mr. Prindle: Your Honor, I want to take this opportunity to make an objection and put it on the record based on Mr. Faulhaber's qualifications—based on Mr. Faulhaber's lack of qualifications, lack of training as far as economics, lack of training or anything that would qualify him as an expert as to growth rates, and also based on the law of the State of Montana that indicates that when determining damages for future loss, the person must take into consideration growth rates and things of this nature. We are objecting to his testifying in this matter based on his qualifications. He is not an expert to testify in this, and he indicated he doesn't know anything about growth rates.

The Court: No, but he can testify if a person purchased an annuity at a certain price what they would receive as per income, and that's all it's going to be. He is not going to talk about all of the rates or anything else.

* * *